IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.A No.17 of 1994

Decided on : December 26, 2007

State of H.P. **…Appellant.**

Versus

Jagdish Chand and another **…Respondents.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

The Hon'ble Mr. Justice Surinder Singh, Judge.

Whether approved for reporting?

For the Appellant : Mr. D.S. Nainta, Deputy Advocate General.

For the Respondents : Mr. Vikram Thakur, Advocate.

Surjit Singh, Judge(Oral)

State has filed this appeal against the judgment of the Sessions Court whereby respondents Jagdish Chand and Uma Sukh, who were charged with and tried for offences punishable under Sections 302 read with Section 120-B IPC, 201 read with Section 120-B IPC and 120-B IPC, have been acquitted.

2. Police filed a report, under Section 173 of the Code of Criminal Procedure, against the present respondents, Jagdish Chand and Uma Sukh, as also one more person named Devi Ram, alleging that deceased Dev Lal was a man of means, he had a large herd of sheep and goats and also possessed other property, including landed property, and he having no issue had promised to respondent Jagdish Chand that on his (deceased's) demise he (respondent Jagdish Chand) would get his entire property. Deceased Dev Lal was allegedly suffering from Leprosy. Actuated by greed to succeed to

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Whether reporters of the local papers may be allowed to see the judgment?

the property of deceased Dev Lal, without much delay, respondent Jagdish Chand allegedly hatched a conspiracy with respondent Uma Sukh and PW-5 Devi Ram. The three in prosecution of the conspiracy procured a gun, which belonged to Hige Chand. Respondent Uma Sukh fired a shot at Dev Lal through that gun. A few pallets hit Dev Lal. Thereafter, PW-5 Devi Ram was asked by the two respondents to hack the deceased to death. PW-5 Devi Ram was handed over an axe by the two respondents. However, before Devi Ram could go to the site where the deceased was hit by the pallets of the shot fired by respondent Uma Sukh, the two respondents allegedly reached that site and pushed deceased Dev Lal into a *Khad.* Wife of Dev Lal thought that her husband, being a patient of leprosy, might have jumped to death or someone might have killed him. She, therefore, lodged a report that her husband having not returned home for several days, it appeared that either he had committed suicide or had been killed by someone. This happened sometime in the year 1988.

3. A year later, PW-5 Devi Ram is alleged to have made a statement to PW-1 Inder Dass, PW-2 Sukh Dass and PW-3 Gian Chand that the deceased had been killed by the two respondents. On the basis of this statement of PW-5 Devi Ram, the present two respondents, as also PW-5 Devi Ram, were taken into custody. Case of murder and conspiracy to commit the offence of murder was registered against all the three. When PW-5 Devi Ram was produced before the Magistrate for police remand, he allegedly made an application, under Section 306 of the Code of Criminal Procedure, for tender of pardon. The concerned Magistrate tendered pardon to him and recorded his statement Ex. PW-4/H. The order of tendering of

pardon passed by the Magistrate, namely PW-4 M.R. Chauhan, is Ex. PW-4/G. Gun was recovered by the Investigating Agency from one Hige Chand, who, it appears, had a license to hold the said gun.

4. On the completion of the investigation, report under Section 173 of the Code of Criminal Procedure, was filed not only against the present two respondents, but also PW-5 Devi Ram, the approver. The Sessions Court (Additional Sessions Judge (1), Shimla) charged the two respondents, as also the approver, with the aforesaid offences. At the end of the trial, both the respondents and PW-5 Devi Ram were acquitted.

5. Trial Court has recorded the following reasons for passing the order of acquittal.

(a) Devi Ram did not narrate the incident, while appearing in the Court as PW-5, but only tendered his statement Ex. PW-4/H made to the Magistrate, during the proceedings for tender of pardon and the said statement is not substantive evidence.

(b) PW-5 Devi Ram could not have been tried alongwith the present respondents, as an accused, once he had been tendered pardon and made an approver. He was supposed to have been discharged and, therefore, he was required to be produced only as a witness.

(c) There was no evidence corroborating, even the statement Ex. PW-4/H, which otherwise also by itself was not substantive evidence and it was not safe to rely upon the statement of an approver without corroboration.

6. We have heard the learned Deputy Advocate General and perused the record.

7. Under Section 306 of the Code of Criminal Procedure, once pardon is tendered to an accomplice, he cannot be challaned, charge-sheeted and tried alongwith the other accused, as is clear from a bare reading of clause (a) of sub-section (4) of Section 306 of the Code of Criminal Procedure, which says that a person tendered pardon under the provisions of Section 306 of the Code of Criminal Procedure, shall be examined as a witness in a subsequent trial, meaning thereby that he would cease to be a co-accused with other persons alleged to have committed the crime. Here, PW-5 Devi Ram was both tried as an accused alongwith the present respondents and also produced as a witness, which is contrary, not only to the aforesaid provision of law, but also the basic principles of criminal justice system. Also, when in the witness box as PW-5, Devi Ram did not state anything against either of the two respondents, but simply tendered in evidence his statement Ex. PW-4/H, which he made to the Magistrate at the time of the tender of the pardon and which was recorded by following the procedure contained in Section 164 of the Code of Criminal Procedure. Such a statement is not a substantive piece of evidence but can only be used as corroborative evidence, under Section 157 of the Evidence Act. He was supposed to have given the narration of the incident, while in the witness-box in the Sessions Court, and only that statement could be used as substantive evidence. Since substantive evidence in the form of the testimony of the approver is lacking in this case, statement Ex. PW-4/H is irrelevant and of no consequence.

8. We find another lacuna in the prosecution case. As a matter of fact, PW-5 Devi Ram exculpated himself by making

statement Ex. PW-4/H and, therefore, he even did not fall in the category of an approver.

9. There is also no evidence on record corroborating the facts testified by PW-5 Devi Ram before the Magistrate, while making statement Ex. PW-4/H. Gun was allegedly procured from one Hige Chand. He was cited as a witness but not examined. Therefore, it cannot be said that the gun was available with the respondents for committing the murder. Also, the gun was not sent to the ballistic expert to seek his opinion whether any fire had been shot through it around the time of the commission of the alleged crime. The police could not recover the dead body and, therefore, even this much cannot be said with certainty that the deceased is no more.

10. For the foregoing reasons, we find no merit in the appeal. The same is, therefore, dismissed.

(Surjit Singh), J

December 26, 2007(sd) **(Surinder Singh), J**